Supreme Court, U. S.
FILED
MAR 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1475

DR. JOHN W. PENCE, Petitioner,

v.

HAROLD BROWN, Secretary of Defense,
JOHN STETSON, Secretary of Air Force,
and EDWIN C. HUDSON, Colonel, USAF
Director of Personnel Actions, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. _____

DR. JOHN W. PENCE, Petitioner,

v.

HAROLD BROWN, Secretary of Defense,
JOHN STETSON, Secretary of Air Force,
and EDWIN C. HUDSON, Colonel, USAF
Director of Personnel Actions, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The Petitioner, Dr. John W. Pence respectfully prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 27, 1978.

OPINION BELOW

Neither the Court of Appeals nor the District Court below rendered an opinion in this cause.

JURISDICTION

The Order of the Court of Appeals for the Sixth Circuit was entered on January 27, 1978. This Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a Petitioner for a Writ of Habeas Corpus which challenges the validity of military active duty orders must be required to exhaust administrative remedies and, therefore, be subjected to arrest, military court martial, and involuntary service pending such review.

2. Whether a Petitioner for a Writ of Habeas challenging the validity of military active duty orders must exhaust administrative remedies where no administrative expertise is needed to resolve the issues and the agency involved has shown bias and deliberately by-passed the administrative process.

STATUTORY PROVISIONS INVOLVED

United States Code Title 10 §1552

STATEMENT OF THE CASE

The Petitioner while attending medical school was approached by Air Force Recruit-

ing Personnel who sought his participation in the Armed Forces Health Professions Scholarship Program. Discussions between the parties continued from April, 1973, until June, 1973. Several representations were made to Petitioner to induce his participation in the Program including the terms of his active duty service should he volunteer. These representations were to the effect that; he would be guaranteed an assignment in either of the first two (2) geographical regions of his choice, that if he completed a residency program, he would enter active duty in the rank of Major and become eligible for promotion four (4) years thereafter.

Dr. Pence thereupon volunteered for this Program which paid his tuition and expenses for two (2) years of medical school and required that he serve for two (2) years on active duty with the Air Force. Upon graduation, Dr. Pence received a three-year pediatric residency which he completed in the spring of 1978.

During the last year of his residency, Dr. Pence learned that the promises made to him concerning the terms of his active duty service would not be kept and he thereupon

attempted to resign from the United States Air Force for reasons of urgent community need for his skills in rural West Tennessee and breach of contract. For approximately one (1) year prior to his scheduled active duty date of July, 1978, Dr. Pence repeatedly sought release from the Air Force; however, each attempt was rebuffed. (App. 15-29).

The last such denial stated in essence that although changes had occurred, there was nothing he could do about these problems except to report to active duty or be subject to trial by Court Martial. None of the Air Force officials contacted by Dr. Pence suggested that he had a right of review before the Air Force Board for the Correction of Military Records pursuant to 10 U.S.C. §1552. This last communication (Petitioner's Exhibit 5, App. 28-29) is as follows:

DEPARTMENT OF THE AIR FORCE
Headquarters Air Force Military Personnel Center
Randolph Air Force Base, Texas 78148

(SEAL)

Reply to
Attn Of: SGCM 31 Mar 1978

Subject: Tender of Resignation

To: John W. Pence, M.D.
801 East Central Avenue
Miamisburg, OH 45342

1. This reply is in response to your letter dated 16 March 1978 to Major Hoffman at the Air Reserve Personnel Center. I am answering this letter as I am the assignment officer for pediatricians in the USAF.

2. Your "Armed Forces Health Professions Scholarship Program Military Service Obligation Agreement--Public Law 92-426," signed by you on 1 July 1973, neither states the rank you would hold upon entering active duty, nor your promotion phase points. The Department of Defense is the agency which directs changes in the rate of promotion, not the Air Force. Air Force entry grades and promotion phase points are driven by this.

3. On 11 July 1977, the Physician Education Branch here at the Air Force Military Personnel Center sent you a packet containing a "Specialty Training and Assignment Preference Form," requesting you return the form as soon as possible to AFMPC/SGCM, but no later than 1 October 1977. The completed form was never received by SGCM. Instead, you began

to communicate with Lt Col Bingham, AFMPC/SGCM, concerning how you could apply for resignation of your commission for the reason of "Community Essentiality." Your resignation for that reason was subsequently refused.

4. Even if an assignment preference form had been timely received from you, there would have been no guarantee of your being assigned to the area requested. The most critically manned areas requiring pediatricians, of which Minot AFB is one, are staffed before other openings. I might add, you were the only deferred physician coming out of training this summer from whom we did not receive an assignment preference form.

5. You will be expected to report to active duty as directed by the orders published by ARPC. If you fail to comply with the orders, you should be aware of the fact that you will be subjecting yourself to possible trial by court martial for violating provisions of the Uniform Code of Military Justice.

/s/Kathryn A. Lorzing
KATHRYN A. LORZING, Major, USAF, NC
Medical Career Division
Office of the Surgeon

Two days prior to the date of the above letter, active duty orders were issued to Dr. Pence requiring him to report on July 9, 1978. (App. 8)

As a result of Respondents' many failures to address Dr. Pence's intraservice claims and faced with the prospect of arrest and prosecution, Dr. Pence filed suit in the United States District Court for the Southern District of Ohio in June, 1978. That Court was not satisfied with its jurisdiction under the principles of Strait v. Laird, 406 U.S. 341 (1972) and dismissed the action without prejudice on July 27, 1978. On August 9, 1978, Dr. Pence then filed the instant action in the United States District Court for the Western District of Tennessee. At the preliminary hearing, the Court determined it did have jurisdiction; however, declined to exercise it as the Petitioner had failed to apply to the Air Force Board for the Correction of Military Records pursuant to 10 U.S.C. §1552. In making this decision, the Court assumed that Petitioner's assertions

were true for the purpose of it ruling, (App. 107). The District Court entered a judgment on August 16, 1978, which, however, stayed the Respondents from arresting the Petitioner or otherwise effectuating custody over him for a fifteen-day period in order to allow Petitioner to seek extraordinary relief from the United States Court of Appeals for the Sixth Circuit. The Court of Appeals granted the stay pending appeal and held oral argument on December 14, 1978. The Court of Appeals on December 27, 1978, without opinion, affirmed the District Court relying upon Seepe v. Department of Navy, 518 F.2d 716 (6th Cir. 1975). On January 3, 1979, the Court of Appeals dissolved and terminated the Stay Order entered on August 29, 1978, and on January 15, 1979, the Court of Appeals denied motions by both Petitioner and Respondents to clarify the Court's previous order.

REASONS FOR GRANTING WRIT

1. THE DECISION BELOW CONFLICTS WITH THE RELIEF PROVIDED BY THE COURTS OF APPEALS IN SIMILAR SITUATIONS.

The Order of the Sixth Circuit Court of Appeals affirming the District Court's Judgment that it should decline to exercise

its jurisdiction due to Petitioner's failure to exhaust pursuant to 10 U.S.C. §1552 is not consistent with the relief provided by the Courts of Appeals and subjects the Petitioner to irreparable injury pending such exhaustion.

In the instant case, the practical effect of the decision below is to subject the Petitioner to immediate arrest, shipment outside of the Western District of Tennessee, involuntary servitude and trial by a military court. The record in the case below on this point is clear and further attested to by the fact that injunctive relief was temporarily granted by both the District Court and the Court of Appeals to prevent Petitioner's arrest pending review.

The appropriate remedy even where exhaustion should be required is the retention of jurisdiction in the District Court pending review by the appropriate Armed Forces Board for Correction of Military Records. Authority for this action is found in Ludlum v. Resor, 507 F.2d 398 (1st Cir. 1974) and in Hayes v. Secretary of Defense, 169 U.S. App. D.C. 209, 515 F.2d 668 (1975).

The appropriateness of remanding to the District Court is further found in Gusik v.

Schilder, 340 U.S. 128 (1950) where this Court found that the Court of Appeals should have held the case pending resort to a newly created administrative remedy for a petitioning military prisoner.

On remand and pending exhaustion, a petitioner would be protected from involuntary activation by means of a stay such as provided in Schatten v. United States, 419 F.2d 187 (6th Cir. 1969). In that case, the Sixth Circuit remanded the cause to the District Court and ordered that a stay of involuntary active duty would continue in effect until the administrative process was completed. The Sixth Circuit in Seepe v. Department of Navy, 518 F.2d 760 (6th Cir. 1975) directed the case remanded under the principles of Gusik v. Schilder, supra, and invited the petitioner to seek a stay of his active duty orders pending exhaustion.

Based on these conflicts, the grant of certiorari to review the Judgment below is appropriate.

2. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING RESOLUTION OF RECRUITING CONTRACT DISPUTES BETWEEN CITIZENS AND THE ARMED FORCES.

The Sixth Circuit's Order affirming a District Court's Judgment that it should decline to exercise its jurisdiction due to Petitioner's failure to exhaust his administrative remedy within the military, is paradoxical and creates a potential for irreparable injury. The decision forces the suitor who challenges the validity of the very agreement which invokes military jurisdiction in the first instance to become subject to that jurisdiction during such review.

The nature of the relief available via 10 U.S.C. §1552 has been determined to be uncertain, and the authority of the Air Force Board for the Correction of Military Records in particular is somewhat limited and cannot give the petitioner complete relief as witnessed by 32 C.F.R. §865.5 which states in part "the application to the Board for correction of a record shall not operate as a stay of any proceedings being taken with respect to the person involved." Absent a stay order from a United States Court, the hardship placed on a petitioner is very clear and the injury he will endure irreparable. The elimination of universal military training merely serves to accentuate this injury as were it not for the voluntary agreement

now in dispute, the petitioner would not be subject to military service.

The Fourth Circuit in United States ex rel Brooks v. Clifford, 412 F.2d 1137 (4th Cir. 1969) expressed doubt that a military board for the correction of records had jurisdiction to grant relief in an appropriate case. That Court stated that the legislative history of this statute shows that the basic purpose was to relieve Congress of the burden of rectifying injustices usually involving monetary claims.

The Ninth Circuit in Montgomery v. Rumsfeld, 572 F.2d 250 (9th Cir. 1978), found that exhaustion pursuant to 10 U.S.C. §1552 was not statutorily specified, and therefore, subject to tailoring to fit the particular scheme as stated in McKart v. United States, 395 U.S. 185 (1969). Such refinement in the absence of selective service obligations would arguably eliminate the need for exhaustion where a petitioner would be subject to involuntary service and possible trial by Court Martial. Such relief would be appropriate in light of Parisi v. Davidson, 405 U.S. 34 (1972) and Oestereich v. Selective Service Board, 393 U.S. 233 (1968) as petitioner and others like him have sought resort

to the United States Courts within a close proximity to their active duty dates, and therefore, become subject to immediate activation and possible arrest and trial by Court Martial while making a good faith challenge in the Courts.

Such a tailoring is clearly justified when the Petitioner as here challenges the validity of his original agreement. In this situation it is clear that such claims are decided under "traditional notions of contract law." Peavy v. Warner, 493 F.2d 748 (5th Cir. 1974). See also Shelton v. Brunson, 465 F.2d 144 (5th Cir. 1972); Johnson v. Chaffe, 469 F.2d 1216 (9th Cir. 1972); Chalfant v. Laird, 420 F.2d 945 (9th Cir. 1969). In addition, the need for administrative expertise in determining the validity or breach of Petitioner's contract would not exist as this is a question of law and accordingly exhaustion should not be required under McKart v. United States, supra.

The record below clearly reflects that Dr. Pence was subject to immediate arrest and removal from the Western District of Tennessee at the time of filing his petition. In addition,the record is clear that the question Dr. Pence raised concerned the validity of his original contract which became the

basis for the military's asserted jurisdiction over him, and that for almost a year prior to his active duty date, Dr. Pence had repeatedly sought, within the military, his release from his contractual undertaking. Under such circumstances, application of the exhaustion doctrine places insurmountable burdens upon a petitioner. Further, in light of the "all-volunteer" status of the military where recruiting inducements are a prime factor in obtaining volunteers, it is not implausible to believe that the military has been overzealous in its efforts. The result, however, should not require the "recruit" to suffer substantial deprivations while his contract claims are being reviewed by an Armed Forces Board.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the Order of the Sixth Circuit.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

FILED
Aug 14 4 36 PM'78
Clerk,U.S.Dist.Court
WesternDist.ofTenn.
C Hg W
OB
USA

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

DR. JOHN W. PENCE, M.D.,)
Petitioner,)
)
v.) NO. 78-2385
HAROLD BROWN, Secretary)
of Defense, et al.,)
Respondents.)

O R D E R

This matter came before the Court on petitioner's motion for a temporary restraining order and/or preliminary injunctive relief pending a hearing on the merits of his petition

for habeas corpus relief. A hearing was held on this date to supplement the various pleadings, memoranda and affidavits previously filed in this matter. Live testimony of petitioner and oral argument was adduced in addition to exhibits.

The Court notes preliminarily that the petitioner made a sufficient showing to indicate that jurisdiction properly lies in this Court under principles announced in Strait v. Laird, 406 U.S. 341 (1972). No final determination however, as to jurisdiction is made at this time.

Without deciding the merits of the petitioner's rights to preliminary injunctive relief, the Court has expressed considerable doubt regarding whether petitioner has established entitlement to this extraordinary relief, particularly in the areas of irreparable harm and the consideration of comparative equities. In the latter regard, the Court notes that while in med school the petitioner has already received substantial benefits from the government through its Armed Forces Health Professions Scholarship Program. The Court does not now reach a decision on the application for a temporary restraining order because it declines to exercise its jurisdiction due to the peti-

tioner's failure to exhaust administrative remedies within the United States Air Force provided by 10 USC § 1552. Seepe v. Department of the Navy, 518 F.2d 760 (6th Cir. 1975).

In passing, the Court has observed that the geographic location of the petitioner's assigned duty station does not appear to be a matter of contract right or entitlement, but rather a mere preference to be accommodated, if possible, by the Air Force. Rather, the basic dispute between the parties appears to center upon the conditions of rank and promotion under which the petitioner would report for active duty.

In the fact of the potential for respondents' exercise of immediate custody and control over the petitioner and upon application of petitioner's counsel for a stay to seek the relief now denied from the Court of Appeals, respondents are stayed from arresting the petitioner or otherwise effectuating custody over him for a period of fifteen (15) days. This stay is permitted solely for the purpose of permitting the petitioner to seek extraordinary relief from the United States Court of Appeals for the Sixth Circuit. The petitioner will be

required, however, to post reasonable security bond in the amount of $500.00 as security for any losses and costs incurred by the respondents as a consequence of the stay application.

This 14th day of August, 1978.

/s/ Harry Wellford
HARRY W. WELLFORD, JUDGE
UNITED STATES DISTRICT COURT

JUDGMENT ON DECISION BY THE COURT CIV 32 (7-63)

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ENTERED
16 AUG 1978
CIVIL ACTION FILE NO.
C-78-2385

DR. JOHN W. PENCE, M.D.,

Petitioner,

vs.

HAROLD BROWN, Secretary of Defense, et al

Respondents.

JUDGMENT

This action came on for ~~hearing~~ (hearing) before the Court, Honorable Harry W. Wellford, United States District Judge, presiding, and the issues having been duly ~~heard~~ (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that in compliance with Order entered by the Court on August 14, 1978, the Court does not now reach a decision on the application for a temporary restraining order because it declines to excercise its jurisdiction due to the petitioner's failure to exhaust administrative remedies within the United States Air Force provided by 10 USC § 1552.

It is further Ordered and Adjudged that the respondents are stayed form arresting the petitioner or otherwise effectuating custody over him for a period of (15) days. This stay is permitted solely for the purpose of permitting the petitioner to seek extraordinary relief from the United States Court of Appeals for the Sixth Circuit.

APPROVED:

/s/ Harry W. Wellford
UNITED STATES DISTRICT JUDGE

F I L E D
AUG 16 1 39 PM '78
Clerk U.S. Dist. Court
~~Western Dist~~. of Tenn.

Dated at Memphis, Tennessee, this 15th day of August, 1978.

/s/J. Franklin Reid
Clerk of Court

No. 78-1380

DEC 27 1978

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT JOHN P. HEHMAN, CLERK

JOHN W. PENCE, M.D., :

Plaintiff-Appellant :

vs : ORDER

:

HAROLD BROWN, Secretary :
of Defense, et al, :

Defendants-Appellees:

Before WEICK, CELEBREZZE and MERRITT, Circuit Judges.

Upon consideration of the briefs, the appendix, and arguments of counsel, it is O R D E R E D that the judgment of the District Court be and it is hereby affirmed on the authority of Seepe v. Department of the Navy, 518 F.2d 760 (6th Cir. 1975).

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
C l e r k

78-1380

F I L E D

UNITED STATES COURT OF APPEALS

JAN-3 1979

FOR THE SIXTH CIRCUIT

JOHN P. HEHMAN, CLERK

JOHN W. PENCE, M.D.)
Petitioner-Appellant,)
)
vs.) O R D E R
)
HAROLD BROWN, JOHN STETSON and EDWIN)
C. HUDSON in their official capacities,)
)
Respondents-Appellees)
)

Before: WEICK, CELEBREZZE and MERRITT, Circuit Judges

The stay order entered on August 29, 1978 and continued in effect by an order dated December 14, 1978, is hereby dissolved and terminated.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
John P. Hehman, Clerk

78-1380

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
JAN 15 1979
JOHN P. HEHMAN,
CLERK

JOHN W. PENCE, M.D.
Petitioner-Appellant,

vs.

HAROLD BROWN, JOHN STETSON and EDWIN C. HUDSON in their official capacities,

Respondents-Appellees

ORDER

Before: WEICK, CELEBREZZE and MERRITT, Circuit Judges

Upon consideration of the appellee's "motion for clarification" and the appellant's "motion to clarify and enlarge and response to appellee's motion to clarify,"

It is ORDERED that the motions be and they hereby are denied.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

/s/ Grace Keller
By Grace Keller, Chief Deputy Clerk

Supreme Court, U. S.
FILED
MAY 2 1979
MICHAEL RODAK, JR., CLERK

No. 78-1475

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN W. PENCE, PETITIONER

v.

HAROLD R. BROWN, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

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JOHN W. PENCE, PETITIONER

v.

HAROLD R. BROWN, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The orders of the district court (Pet. App. 1-4) and of the court of appeals (Pet. App. 7) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1978 (Pet. App. 7). The petition for a writ of certiorari was filed on March 26, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's failure to exhaust his administrative remedies precludes his current challenge to the terms of his military service.

STATEMENT

On July 1, 1973, petitioner volunteered to participate in the Armed Forces Health Professions Scholarship Program. He was a medical student, and the program paid his tuition and expenses for two years of medical school in return for two years of active duty in the Air Force. After completion of two years of residency in pediatrics, petitioner tendered his resignation from the Air Force. He contended that there was an urgent need for his services in a rural community and that the Air Force had failed to honor the details of his contract.[1] The resignation was not accepted; petitioner was ordered to active duty in July 1978, after he completed his residency. He failed to report as ordered. Some time after his failure to report, petitioner filed this suit seeking release from his contract.

The district court declined to exercise jurisdiction, holding that petitioner had failed to exhaust his administrative remedies by applying to the Air Force Board for Correction of Military Records as provided by 10 U.S.C. 1552 (Pet. App. 1-4). The court of appeals affirmed, agreeing with the district court that petitioner had ignored his administrative remedies (Pet. App. 7). Petitioner now is serving as a pediatrician for military dependents at Minot Air Force Base, North Dakota.[2] Court-martial proceedings against him for his failure to report for active duty in July 1978 are pending.

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[1]He alleged that he was guaranteed assignment to one of his first two choices of geographical areas. He also alleged he was promised that he would enter active duty with the rank of Major and be eligible for promotion four years later.

[2]Petitioner surrendered to Air Force authorities on January 11, 1979, and then applied for an order from this Court compelling his release from active duty pending the disposition of his petition for a writ of certiorari. The application (No. A-844) was denied by Mr. Justice Stewart on April 6, 1979, and by the Court on April 23, 1979.

ARGUMENT

A serviceman cannot challenge the terms of his military service in the federal courts until he has exhausted the available administrative remedies. *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975); *Noyd* v. *Bond*, 395 U.S. 683 (1969); *Gusik* v. *Schilder*, 340 U.S. 128 (1950).[3] As this Court pointed out in *Schlesinger* v. *Councilman*, *supra*, the exhaustion doctrine is based on the ability of agencies to develop the facts, apply the law and correct their own errors. It ensures that any authorized judicial review will be well-informed and based on a considered administrative decision. It avoids duplicative proceedings and often obviates the need for judicial review (420 U.S. at 756-757).

Petitioner ignored his administrative remedies for some time. He resorted, instead, to self-help, simply disregarding the order to report for duty. Finally, six days before oral argument in the court of appeals, he mailed an appeal to the Air Force Board for Correction of Military Records. But that tardy step simply commenced the administrative process. The decision of the Board has yet to be made; the Board should have its opportunity.

Petitioner contends that there is no need for exhaustion of his administrative remedies because the

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[3]See also *Diliberti* v. *Brown*, 583 F. 2d 950 (7th Cir. 1978); *Seepe* v. *Department of the Navy*, 518 F. 2d 760 (6th Cir. 1975); *Horn* v. *Schlesinger*, 514 F. 2d 549 (8th Cir. 1975); *Champagne* v. *Schlesinger*, 506 F. 2d 979 (7th Cir. 1974); *Hodges* v. *Callaway*, 499 F. 2d 417 (5th Cir. 1974); *Sherengos* v. *Seamans*, 449 F. 2d 333 (4th Cir. 1971); *Nelson* v. *Miller*, 373 F. 2d 474 (3d Cir.), cert. denied, 387 U.S. 924 (1967); *Sohm* v. *Fowler*, 365 F. 2d 915 (D.C. Cir. 1966). Petitioner cites *Parisi* v. *Davidson*, 405 U.S. 34 (1972); the serviceman there had exhausted his administrative remedies (*id.* at 37).

question at issue is purely a matter of contract law. That is not so. It is a mixed question of fact and of law. If the Air Force's development of the facts and its application of the law does not eliminate the need for a judicial decision, its efforts will at least facilitate that review. *Seepe* v. *Department of the Navy*, 518 F. 2d 760 (6th Cir. 1975).[4]

The fact that petitioner is on active duty and that court-martial proceedings are pending does not excuse him from exhausting his administrative remedies. *Schlesinger* v. *Councilman*, *supra*, 420 U.S. at 758. The military bodies designated to hear claims like petitioner's—and to vindicate those claims if they are substantiated—have not yet been able to consider them. Petitioner may appeal the denial of his resignation to the Air Force Board for Correction of Military Records, a process he has initiated. The decision of the Board is reviewable by a court. 10 U.S.C. 1552; 32 C.F.R. Part 865, Subpart A; *Seepe* v. *Department of the Navy*, *supra*. Petitioner may defend court-martial proceedings on the basis of the unlawfulness of the order to report for duty. 10 U.S.C. 886. Petitioner may also seek to resign for the good of the service in lieu of court-martial and pursue that remedy through administrative processes. Air Force Reg. 36-12.

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[4]Petitioner suggets (Pet. 14) that because military service is now voluntary, his contract with the Air Force is suspect. That claim is without merit. Petitioner signed a contract with the Air Force agreeing to perform two years of active duty in return for receiving tuition and expenses for two years of medical school. He received the benefit of his bargain. A person is bound by the contracts he makes; his performance of their terms is a legal duty. 1 *Williston on Contracts* §1 (Jaeger ed. 1957); 1 A. Corbin, *Contracts* §3 (1963).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MAY 1979

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 78-1475

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-1475
JOHN W. PENCE, Petitioner
v.
HAROLD R. BROWN, Secretary of Defense, et al

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

REPLY STATEMENT

Respondents in their Brief suggest that Petitioner tendered one resignation which was not accepted and that at some time after his active duty date suit was filed. In reply, Petitioner would assert that on five (5) occasions, he attempted to resign (App. 15, 17, 22, 24 and 26) covering almost an entire year prior to his anticipated active duty date of July of 1978, as that date drew near, he filed an action in the United States District Court for the Southern District of Ohio, Civil No. 1-78-405 in June, 1978. The District Court of Ohio was not satisfied with its jurisdiction and Petitioner, therefore, began the instant action in the proper district court below. Petitioner attempted to create a dialogue with Respondents from August of 1977 until a month prior to his active duty date when he originally filed suit.

Notwithstanding the many attempts made by Petitioner, the District Court below declined to exercise its jurisdiction determining that he had failed to exhaust his administrative remedies. When the United States Court of Appeals for the Sixth Circuit affirmed this decision and later terminated its stay against the Repondents, Petitioner surrendered himself and is now serving as a pediatrician at Minor Air Force Base, North Dakota, and is currently facing Court Martial Proceedings for his absence from military duty during the course of the civil proceedings below.

Petitioner did mail his Application to the Air Force Board for the Correction of Military Records on December 8, 1978, pursuant to 10 U.S.C. §1552, and that agency has

informed Petitioner that his case will be reviewed on June 8, 1979.

ARGUMENT

Respondents place emphasis on Schlesinger v. Councilman, 420 U.S. 738 (1975). This case, however, is not particularly suited to the concept of administrative exhaustion as it dealt with the conviction of an Army officer for selling drugs. The Court in ruling relied on Younger v. Harris, 401 U.S. 37 (1971) in finding that Capt. Councilman would suffer no harm other than those normally attendant to the resolution of his case in the military courts. The Court further found that the issue in dispute was whether or not the crime was service connected, requiring a distinct impact on military discipline, a question with which military courts have such expertise as to make their judgments indispensable for proper review. Dr. Pence is in a far different category than one already on active duty and subject to military control.

Likewise, in Noyd v. Bond, 395 U.S. 683 (1969), the petitioner was a career Air Force officer who had been convicted of refusing to obey an order. The Court found that this

officer's failure to appeal his conviction within the military had not been excused where he had at no time attempted to show that prompt and effective relief was not available. In the instant case, Dr. Pence has shown that the relief afforded under 10 U.S.C. §1552 is neither prompt or effective. The character of the injuries he is now enduring is clearly irreparable.

Under the principles of both Gusik v. Schilder, 340 U.S. 128 (1950) and McKart v. United States, 395 U.S. 185 (1969), it is clear that the blind application of the exhaustion doctrine is inequitable in this case.

CONCLUSION

For these reasons and those contained in the original Petition, a Writ of Certiorari should be granted to review the Order of the Sixth Circuit.

Respectfully submitted.

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No. 78-1475

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1978

JOHN W. PENCE, Petitioner

v.

HAROLD R. BROWN, Secretary of Defense, et al

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

PROOF OF SERVICE

I hereby certify that three (3) copies of Petitioner's Reply Brief have been served on Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530, by Express Mail, this 11th day of May, 1979.

DAVID E. CAYWOOD